No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL DIVISION 732, AMALGAMATED TRANSIT UNION and MARTIN J. BURNS,

Petitioners.

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

LINDA R. HIRSHMAN*
JACOBS, BURNS, SUGARMAN & ORLOVE
201 North Wells Street, Suite 1900
Chicago, Illinois 60606
Telephone: 312/372-1646

Of Counsel:

EARLE PUTNAM
General Counsel
Amalgamated Transit Union
5025 Wisconsin Avenue, N.W.
Washington, D.C. 20016

**Counsel of Record*

Keenan Printing Company 312-648-0050 385

QUESTIONS PRESENTED

1. As a condition on the receipt of federal assistance, the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), requires states to make laws to enable applicants for federal transit assistance to protect their employees' collective bargaining rights. After a state makes such a law and the applicant commits to the protections required by the federal statute, and after millions of federal dollars have issued on the strength of those commitments, does federal law allow a state court to refuse to enforce them?

2. The federal Arbitration Act, 9 U.S.C. § 1 *et seq.* is federal substantive law that state courts must apply to enforce arbitration commitments relating to interstate commerce. May a state court make an exception to the federal Arbitration Act for cases involving the commitments required by the Urban Mass Transportation Act?

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Petitioner,

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, Division 732, Amalgamated Transit Union, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on May 11, 1983.

OPINIONS BELOW

The opinion of the Fulton County Superior Court is unreported and appears at Appendix (hereafter "App.") at A1; the order of the Georgia Appellate Court is unreported and appears at App. B1; the opinion of the Supreme Court of Georgia (App. C1) is reported at 251 Ga. 15 (1983).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on May 11, 1983. This Court's jurisdiction is invoked under Section 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 *et seq.*, the federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the MARTA Act, Ga. L. 1965 p. 2243 *et seq.* The pertinent provisions of these statutes are reproduced in the Appendix at pp. D1-F1.

STATEMENT OF THE CASE

I. Facts

In 1965, immediately following the passage of the federal Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (hereafter "UMTA"), Georgia passed a statute establishing the Metropolitan Atlanta Rapid Transit Authority (hereafter "MARTA") to provide the legal framework for the public provision of transit services. (Ga. L. 1965 p. 2243) (hereafter "MARTA Act"). Among other things, the MARTA Act authorized the MARTA Board of Directors to bargain with MARTA employees "through such agents in the same manner and to the same extent as if they were the employees of any privately-owned transportation system." (*id.* at 2273).[1]

In 1971, when the state decided to take over the provision of public transit services in Atlanta from the formerly private transit provider, it brought MARTA into active service. In order to buy out the private company, MARTA applied for a massive federal grant under the UMTA. Section 13(c) of the UMTA, 49 U.S.C. § 1609(c), requires a grant recipient to provide satisfactory protective arrangements for its employees. The statute also requires that such arrangements be incorporated in the grant contract itself.[2]

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1. The Georgia Supreme Court held in the case at hand that this provision of the MARTA Act "created an exception for MARTA, because under Georgia law local government entities generally are not permitted to bargain collectively with employee representatives." (App. p. C3).

2. In full § 13(c) provides:

> It shall be a condition of any assistance under section 3 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests

(Footnote continued on next page)

Accordingly, as required by § 13(c) of UMTA, and with the authority of the MARTA Act provided by the Georgia legislature, MARTA entered into such an agreement with the Union (the 1971 "Section 13(c) Agreement"). The terms of the § 13(c) Agreement continued without material change throughout the time at issue in this case.[3]

The § 13(c) Agreement obligated the parties to submit to an arbitrator all labor disputes, including disputes over what their new collective bargaining agreement should be.[4] Thereafter, MARTA and the Union twice submitted to interest arbitration.

(Footnote continued from preceding page)

of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their position with respect to employment; (4) assurances of employment of employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their position with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

3. MARTA simply reiterated its compliance with all material terms of the 1971 § 13(c) Agreement to qualify for the dozens of ensuing federal grants.

4. This type of arbitration is called "interest arbitration" and is widely viewed as a substitute for the right to strike, which is lost when a public takeover transfers transit employees like MARTA's employees out of the private sector and the protections of the National Labor Relations Act. Elkouri and Elkouri, *How Arbitration Works*, (3rd Ed. 1976), pp. 7-8, 50.

In 1982, the parties were engaged in a third such interest arbitration when the United States Court of Appeals for the Eleventh Circuit ruled, in a related § 13(c) case, that the federal courts lacked subject matter jurisdiction over the union's action to enforce its § 13(c) Agreement with MARTA. *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 667 F. 2d 1327 (11th Cir. 1982). Shortly thereafter, MARTA announced its withdrawal from the pending interest arbitration, contending that a doctrine of Georgia common law permitted it to revoke the arbitration provisions of its § 13(c) Agreement at will. This litigation followed.

II. The Proceedings In This Case

After announcing its withdrawal from arbitration, MARTA filed this action in Georgia state court to enjoin the Union and the neutral arbitrator from proceeding and for a declaratory judgment of the propriety of MARTA's revocation. MARTA contended, in essence, that the court ruling in *Division 732, supra*, that the federal courts lacked jurisdiction to enforce the § 13(c) Agreement, freed it to void its Agreement. The trial court granted MARTA a declaratory judgment and permanent injunction against any further arbitration proceedings. Although, prior to these events, MARTA had always acknowledged its contractual obligation to arbitrate, the trial court found that Georgia law relieved MARTA of this obligation.

The Union appealed to the Georgia Court of Appeals, which ruled that the appeal properly belonged in the Georgia Supreme Court. On May 11, 1983, the Georgia Supreme Court affirmed the judgment of the superior

court, one Justice dissenting. The supreme court ruled that this Court's decision in *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, —— U.S. ——, 102 S. Ct. 2202 (1982), meant that MARTA's existing § 13(c) Agreements could be voided by state common law. The court then interpreted an old and seldom-applied doctrine of Georgia common law to allow MARTA to revoke its commitment to arbitrate. In so holding, the Georgia court refused to apply the MARTA Act as authority to bind MARTA to its commitments. The court also refused to follow the federal Arbitration Act, which, for several years, it had routinely applied in place of the Georgia common law to enforce other Georgia contracts to arbitrate.

The Union petitions for review of this decision.

REASONS FOR GRANTING THE WRIT

I.

This Decision Conflicts With This Court's Decision in *Jackson*.

In *Jackson*, this Court held that "Congress intended that § 13(c) would be an important tool to protect collective bargaining rights of transit workers, *by ensuring that state law preserved their rights* before federal aid could be used to convert private companies into public entities." —— U.S. at ——; 102 S. Ct. at 2209 (emphasis added). After state law was brought into conformity with federal requirements and the requisite commitments made, this Court continued, the employees' rights which concerned Congress should be protected by actions in the state courts.

Here, the state of Georgia followed the UMTA as this Court construed it in *Jackson*. Before applying for federal UMTA funds, Georgia changed its law to authorize the Atlanta transit authority to make the commitments required by the federal statute.[5] Thus authorized by Georgia law, MARTA complied with the requirements of the federal act by concluding a § 13(c) agreement with the Union for the preservation of the employees' rights.[6] Thereafter, the U.S. Secretary of Labor certified that the § 13(c) Agreement satisfied the Act, and MARTA began to receive federal money.[7]

The § 13(c) Agreement obligated MARTA to arbitrate labor disputes with the Union, including disputes over the terms of new collective bargaining agreements, should

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5. As this Court noted in *Jackson*, in enacting the UMTA, "Congress was aware that public ownership might threaten existing collective bargaining rights of unionized transit workers employed by private companies." —— U.S. at ——; 102 S. Ct. at 2204. To meet this concern, the Georgia legislature chose the straightforward device of simply authorizing MARTA, the public body, to bargain with its employees as if they were still private. See, p. 3, *supra*.

6. The record in this case contains dozens of letters of counsel from MARTA's counsel (then and in this case) affirming to the United Department of Transportation that no doctrine of state or local law precluded MARTA from abiding by the commitments it had made to qualify for federal UMTA aid. Of course, these commitments included the § 13(c) Agreement at issue here.

7. Throughout the litigation of this case, MARTA counsel has admitted that, at the time the § 13(c) Agreements were concluded, the U.S. Secretary of Labor was requiring agreements including interest arbitration and that MARTA signed the § 13(c) Agreements because they were the only avenue to federal funding.

bargaining fail.[8] In this action, eighteen years after Georgia altered its state law to conform to the UMTA, and twelve years after the Georgia grant applicant began receiving UMTA funds, the Georgia Supreme Court ruled that the federal grant recipient was simply not obligated to honor the commitments it had made. In so doing, the Georgia court refused to apply the law the state itself had passed — the MARTA Act — to ensure the employees' continued collective bargaining rights as federal law required. Instead, the Georgia court ignored the Act and voided MARTA's agreement under a local nineteenth century common law doctrine that contracts to arbitrate are not enforceable. This defiance of this Court's ruling in *Jackson* would, alone, warrant this Court's review.

In addition, in *Jackson*, this Court recognized the "importance of the interpretation of § 13(c) for transit labor relations." —— U.S. ——, 102 S. Ct. at 2205. As that case reflected, as a result of the nationwide scope of § 13(c), almost every transit system in the country has executed a § 13(c) Agreement with the Unions representing its employees. *See, e.g., Jackson, supra,* at n. 5. This Court decided in *Jackson* that § 13(c) did not create a claim for transit

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8. Treating MARTA's employees as private employees, as the MARTA Act authorized MARTA to do, the agreement to arbitrate was unquestionably legal and enforceable, since agreements to interest arbitration are legal and enforceable under federal law governing private sector labor relations. *Chattanooga Mailers* v. *Chattanooga News-Free Press,* 524 F. 2d 1305 (6th Cir. 1975); *Winston-Salem Printing Pressmen and Assistants' Union* v. *Piedmont Publishing Co.,* 393 F. 2d 221 (4th Cir. 1968).

Not surprisingly, since the MARTA Act on its face seemed to authorize any bargaining allowed in the private sphere, both parties' briefs and arguments in all the Georgia courts focused on the MARTA Act. However, the Georgia Supreme Court merely noted the existence of the statute in a footnote, and never addressed its application to the case. (App. C3).

labor to enforce its § 13(c) protections in federal court. However, this Court also decided that the rights created by the federal act would be meaningful and enforceable by virtue of the changes that statute exacted in local law.

At the time Congress enacted the UMTA, many states' common law included doctrines inconsistent with the requirements of § 13(c). Accordingly, at least eighteen states besides Georgia have passed statutes to satisfy the federal mandate to "protect the . . . rights of transit workers." (*id.* at 2209).[9] If, as here, the state courts are free to ignore the local transit law required by the federal act, and to refuse to enforce the commitments made and submitted to qualify for federal funds, the federal statute will be stripped of all content.[10] As this Court explicitly set forth in *Jackson*, this result would be directly contrary to Congress' will in this "important" area: "Congress expected [the] § 13(c) Agreement . . . like [an] ordinary contract . . . to be enforceable by private suit upon a breach." (*id.* at 2206).

In addition to *Jackson*, this decision conflicts with a long line of this Court's decisions prohibiting state courts from

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9. Alabama, California, Colorado, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Pennsylvania, Oregon, Ohio, and Tennessee all have statutes designed, like the MARTA Act, to conform state law to the requirements of § 13(c).

10. This case well illustrates the problem: The federal financing of MARTA's public takeover is now well in the past, and, therefore, the remedy of compelling compliance with the § 13(c) Agreements by holding up the federal funding of the takeover is completely out of reach. Having taken the money, MARTA has decided to stop complying with the terms of the agreement it concluded, and the highest court of the state has declined to apply the law the state passed to fulfill the federal mandate.

construing states and localities out of obligations required by federal law. These restrictions on the states derive from the seminal case of *Ward* v. *Love County*, 253 U.S. 17 (1920). There, this Court had ruled that federal law exempted certain Indian lands from local taxation. After that decision, the Oklahoma state supreme court ruled that, nonetheless, the taxes collected from the Indians could not be returned, because there was no state statute authorizing a tax refund. This Court granted certiorari and reversed, ruling that the state could not construe local law to fail to provide a remedy for violation of rights with their origin in federal law.

This Court has followed *Ward* consistently when federal law depends for its effectuation on the legal machinery of the states. *Adam* v. *Saenger*, 303 U.S. 59 (1938) (state courts may not apply local law in order to escape federal obligation to extend full faith and credit to other states' judgments); *State* v. *Sims*, 341 U.S. 22 (1951) (state supreme court may not apply local law to construe state out of its commitment to interstate compact); *see also Testa* v. *Katt*, 330 U.S. 386 (1947). State supreme courts, too, have routinely recognized the obligation to construe their state law to support, not void, the obligations originally required by Congress. *Antle* v. *Tuchbreiter*, 414 Ill. 571, 11 N.E. 2d 836 (1953) (state court may not invalidate state statutes passed to comply with federal Social Security law); *Pearson* v. *State Social Welfare Board*, 54 Cal. 2d 184, 353 P. 2d 33, 5 Cal. Rptr. 553 (1960) (state welfare statute must be construed to comply with federal act in welfare scheme of cooperative federalism); *Alaska State Housing Authority* v. *Contento*, 432 P. 2d 117 (1967) (state relocation statute must be construed with regard to requirements of federal highway act).

Indeed, no rational legal system could allow a state simply to take money from the United States and then construe away its own obligations.[11] Since the decision here allows the local federal grant recipient to keep the federal funds while the local courts construe it out of its commitments, it conflicts with the well-established contrary decisions of this Court, most recently articulated in *Jackson*, and of several state supreme courts and should be reversed.

II.

This Case Conflicts With This Court's Decision In *Moses H. Cone Memorial Hospital* v. *Mercury Const.*, —— U.S. ——, 103 S. Ct. 927 (1983).

This Court should grant a writ of certiorari and reverse here for a second reason: the particular Georgia common law doctrine applied here has been preempted by the federal Arbitration Act. In *Cone Memorial Hospital, supra*, this Court ruled that, in enforcing contracts to arbitrate: "state courts, as much as federal courts," are obliged to follow the provisions of the federal Arbitration Act, which makes such promises enforceable, not revocable. (103 S. Ct. at 942). In *Cone Memorial Hospital*, this Court noted explicitly that, because of the anomalous failure of the federal Arbitration Act to create independent federal court juris-

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11. In recent opinions, this Court has indicated that the proper remedy might be to require the grant recipient to comply with the commitments required by Congress but to extend to it as well the option of forfeiting the funds received. *Guardians Association* v. *Civil Service Commission of the City of New York*, —— U.S. ——, 51 U.S.L.W. 5105, 5109 (1983). Since the Georgia Supreme Court found that MARTA simply had no obligation to comply with the commitments made to satisfy the federal act, the court did not reach the question of remedy.

diction, "enforcement of the act is left in large part to the state courts." (*id.* at p. 942, n. 32). "Nevertheless," this Court concluded, "it represents federal policy."[12] The decision in this case is thus a direct violation of the Georgia Courts' responsibility, just set forth in *Cone Memorial Hospital*, to enforce the federal Arbitration Act in a contract affecting commerce.

The Georgia Court brushed aside the Petitioner's entire federal Arbitration Act contention with the *non sequitur* that "Jackson Transit Authority hold[s] that state law is applicable here." (App. p. C10). The Arbitration Act, an exercise of Congress' commerce power long antedating the statute construed in *Jackson*, makes enforceable arbitration agreements evidencing transactions affecting in-

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12. Beginning with Judge Medina's well-reasoned opinion in 1959, *Lawrence* v. *Devonshire*, 271 F. 2d 402 (2nd Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), various state and federal courts have held that, as this Court just confirmed in *Cone*, the Arbitration Act applies as substantive federal law to make agreements to arbitrate affecting interstate commerce enforceable, not revocable, regardless of the court involved. *A/S J. Ludwig* v. *Dow*, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660, 255 N.E. 2d 774 (N.Y. 1970), *cert. denied*, 398 U.S. 939 (1970); *Mamlin* v. *Susan Thomas, Inc.*, 490 S.W. 2d 634 (Tex. Civ. App. 1973); *Northern Illinois Company* v. *Airco Industrial Gases*, 676 F. 2d at 270, 275 (7th Cir. 1982); *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Haydu*, 367 F. 2d 391, 395 (5th Cir. 1981); *Metro Industrial Painting* v. *Terminal*, 287 F. 2d 382 (2nd Cir. 1961), *cert. denied*, 368 U.S. 817 (1961).

Indeed prior to the decision in this case, the George Supreme Court was a leader in recognizing that the federal Arbitration Act replaced the old local common law doctrine of revocability and made local arbitration contracts enforceable in state court suits. *West-Point Pepperell, Inc.* v. *Multi-Line Industries*, 231 Ga. 329, 201 S.E. 2d 452 (1973). Thus, the Georgia Supreme Court violated its own precedent in order to withhold enforcement here.

terstate commerce. By its terms, it applies to the arbitration provisions of all such contracts, whether state law is otherwise "applicable" or not.[13] Although *Jackson* held that the federal UMTA did not itself convert the § 13(c) Agreements into "federal" contracts, neither *Jackson* nor the UMTA addressed — much less repealed — the application of the federal Arbitration Act to the arbitration provisions of otherwise local contracts. Accordingly, under *Cone Memorial Hospital*, the Georgia court must apply the arbitration Act to the § 13(c) Agreement, like any other "ordinary" "enforceable" contract. *Jackson, supra*, at 2206.

As reflected by the number of cases raising this issue before *Cone Memorial Hospital*, the state court's obligation to apply the federal Arbitration Act is an important and much litigated question. Accordingly, for this reason, too, a writ of *certiorari* should issue to reverse the decision here.

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13. Most such contracts are, of course, otherwise governed by "state law," and the cases, both in state court and federal diversity cases, reflect this dichotomy. The courts apply the federal Arbitration Act to issues — such as revocability — to which the statute is addressed and state law to all other questions. *See, e.g., Hartford* v. *Software,* 550 F. Supp. 1079 (D. Me. 1982); *Farkar* v. *Hanson,* 441 F. Supp. 841, 845 (S.D.N.Y. 1977), *aff'd* and *modified,* 583 F. 2d 68 (1978); *aff'd* and *modified,* 604 F. 2d 1 (1979); *Wells Fargo* v. *London,* 408 F. Supp. 626, 628-30 (S.D.N.Y. 1976).

CONCLUSION

For the reasons set forth above, this Court should grant a writ of *certiorari* and reverse.

Respectfully submitted,

LINDA R. HIRSHMAN*
JACOBS, BURNS, SUGARMAN
& ORLOVE
201 North Wells Street, Suite 1900
Chicago, Illinois 60606
Telephone: 312/372-1646

Of Counsel:

EARLE PUTNAM
General Counsel
Amalgamated Transit Union
5025 Wisconsin Avenue, N.W.
Washington, D.C. 20016

**Counsel of Record*

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APPENDIX

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, *Plaintiff,* v. LOCAL DIVISION 732, AMALGAMATED TRANSIT UNION, JOHN F. CARAWAY, and MARTIN J. BURNS, *Defendants.*	CIVIL ACTION, FILE NO. C-83621

ORDER

The above styled action came on regularly before this Court for hearing on June 7, 1982. Upon stipulation by counsel that the issues be decided by the Court without a jury, and after considering all of the evidence and pleading in this matter, the Court sets forth the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

The stipulation of June 3, 1982 entered into between plaintiff and defendants Local Division 732 (the Union) and Burns, and filed with this Court on June 4, 1982 con-

tains thirty-four (34) separate paragraphs of fact which are admitted. These are hereby incorporated by reference as findings of fact.

2.

Plaintiff Metropolitan Atlanta Rapid Transit Authority (MARTA) is a public body corporate created by the General Assembly of Georgia and is a joint instrumentality of the City of Atlanta and the Counties of Fulton, DeKalb, Clayton and Gwinnett. As a public body corporate, MARTA is a political subdivision of the State of Georgia, and is subject to the jurisdiction of this Court.

3.

Defendant Local Division 732, Amalgamated Transit Union (Union), is an unincorporated labor organization which represents certain employees of plaintiff MARTA and which is subject to the jurisdiction of this Court.

4.

Defendant Martin J. Burns is a resident of the State of Illinois and has transacted business germane to this proceeding in Fulton County, Georgia.

5.

At all times since the creation of MARTA, Local 732 has been recognized as the collective bargaining representative for certain of plaintiff's employees. Prior thereto, the Union was recognized as the collective bargaining representative of certain employees of Atlanta Transit System, Inc.

6.

In 1971, MARTA applied to the United States government for a capital improvement grant under the Urban Mass Transportation Act (hereinafter UMTA) to assist MARTA in the acquisition of the Atlanta Transit System, Inc. Since 1971, MARTA has made a number of other applications for capital improvement, as well as operating assistance, grants under UMTA, including an application for funds in 1977, known as federal assistance grant, GA-03-0017.

7.

Section 13(c) of the UMTA, 49 U.S.C. § 1609(c), requires a grant recipient to provide satisfactory protective arrangements for its employees. The statute also requires that such arrangements be incorporated in the grant contract itself. In full § 13(c) provides:

> "It shall be a condition of any assistance under this chapter that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protecting of individual employees against a worsening of their position with respect to employment; (4) assurances of employment of employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining pro-

grams. Such arrangements shall include provisions protecting such individual employees against a worsening of their position with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) of this title. The Contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

8.

On August 9, 1971, MARTA entered into an agreement with the Union, as required by § 13(c) of UMTA (hereinafter, "the 1971 Section 13(c) Agreement"), with respect to federal assistance grant GA-UTG-7. The 1971 § 13(c) Agreement was applied by agreement of the parties to all subsequent MARTA grant applications until 1977.

9.

On February 14, 1977, pursuant to § 13(c) of UMTA, MARTA entered into a new § 13(c) Agreement with the Union (hereinafter "the 1977 § 13(c) Agreement") with respect to an application for an UMTA grant. The 1977 § 13(c) Agreement has been applied by the parties to all subsequent MARTA grant applications made since 1977 including the most recent grant application made in 1981, known as federal assistance grant GA-06-0014.

10.

The 1977 § 13(c) Agreement between the parties provides, *inter alia*, that MARTA recognizes the Union as the collective bargaining representative of the employees of the transit system; that MARTA shall bargain collectively with the Union over the terms and conditions of

employment; that MARTA shall preserve and continue all rights, privileges and benefits provided in existing or future collective bargaining agreements; and that the assistance project shall be carried out so as not to adversely affect the employees represented by the Union.

11.

Paragraph (8) of the 1971 § 13(c) Agreement provides that:

> (8) In case of any labor dispute or controversy regarding the application, interpretation, or enforce of any of the provisions of this agreement which cannot be settled by collective bargaining within sixty (60) days after the dispute or controversy first arises hereto, such dispute or controversy may be submitted at the written request of either party hereto to a board of arbitration as hereinafter provided. Upon such written request for arbitration, each party shall, within ten (10) days after such request, select one member of the arbitration board, and the members thus chosen shall select a neutral member who shall serve as chairman. Should the members selected by the parties be unable to agree upon the appointment of the neutral member within ten (10) days, any party may request the American Arbitration Association to furnish a list of five (5) persons from which the neutral member shall be selected. The parties shall, within five (5) days after receipt of such list, determine by lot the order of elimination, and thereafter the Union and the other interested party or parties shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral member. The decision by majority vote of the arbitration board shall be final, binding and con-

clusive; all contract conditions shall remain undisturbed, there shall be no lock-outs, strikes, walk-outs or interference with or interruption of MARTA operations during the arbitration proceedings or to upset the award. Each party shall pay the fees and expenses of the third or impartial arbitrator, as well as any other joint expenses incidental to the arbitration, shall be borne equally by the parties.

The above time limitations may be extended by mutual written agreements of the parties hereto and such agreement shall not be unreasonably withheld by either party. Except where arbitration is requested as provided hereinabove, nothing in this agreement shall be construed to enlarge or limit the right of any party to utilize, upon the expiration of any collective bargaining agreement any economic measures that are not inconsistent or in conflict with applicable laws. (1971 § 13(c) Agreement)

Paragraph (16) of the 1971 § 13(c) Agreement provides that:

(16) In the event that the employees covered by this agreement become employees of MARTA, the term "labor dispute," for the purposes of paragraph (8) herein, shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, any differences or questions that may arise between the parties, including the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, or any grievances that may arise, and any controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

12.

Paragraph (20) of the 1977 § 13(c) Agreement provides that:

> (20) In case of any labor dispute or controversy regarding the application, interpretation, or enforcement of any of the provisions of this Agreement which cannot be settled by collective bargaining within sixty (60) days after the dispute or controversy first arises, such dispute or controversy may be submitted at the written request of either party hereto to a board of arbitration as hereinafter provided. Upon such written request for arbitration, each party shall, within ten (10) days after such request, select one member of the arbitration board, and the members thus chosen shall select a neutral member who shall serve as chairman. Should the members selected by the parties be unable to agree upon the appointment of the neutral member within ten (10) days, any party may request the American Arbitration Association to furnish a list of five (5) persons from which the neutral member shall be selected. The parties shall, within five (5) days after the receipt such list, determine by lot the order of elimination, and thereafter the Union and the other interested party or parties shall in that order alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral member. The decision by majority vote of the arbitration board shall be final, binding and conclusive; all contract conditions shall remain undisturbed, there shall be no lock-outs, strikes, walk-outs, or interference with or interruption of MARTA operations during the arbitration proceedings or to upset the award.
>
> Each party shall pay the fees and expenses of the arbitrator it selects. The fees and expenses of the third or impartial arbitrator, as well as any other joint expenses incidental to the arbitration, shall be borne equally by the parties.

The above time limitation may be extended by mutual written agreement of the parties hereto and such agreement shall not be unreasonably withheld by either party. Except where arbitration is requested as provided hereinabove, nothing in this Agreement shall be construed to enlarge or limit the right of any party to utilize, upon the expiration of any collective bargaining agreement any economic measures that are not inconsistent or in conflict with applicable laws.

The term "labor dispute," for the purposes of this paragraph, shall be broadly construed and shall include but not be limited to, any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance, or pension or retirement provisions, any differences or questions that may arise between the parties, including the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, or any grievances that may arise, and any controversy out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Provision (1977 § 13(c) Agreement).

13.

A number of MARTA applications for UMTA grants to which the 1971 § 13(c) Agreement has been applied were approved by the Urban Mass Transportation Administration, and thereafter MARTA received funds under said grants.

14.

Similarly, a number of MARTA applications for UMTA grants to which the 1977 § 13(c) Agreement has been applied have been approved by the Urban Mass Transportation Administration, and thereafter MARTA received funds under said grants.

15.

Since MARTA began its operations, MARTA has bought goods and equipment from sources outside of Georgia. Among the funds used to purchase such goods and equipment were funds provided by grants from the U.S. Urban Mass Transportation Administration.

16.

Since MARTA began its operations, MARTA has operated bus routes to and from Atlanta/Hartsfield International Airport, the Greyhound and Trailways Intercity bus stations, and the Brookwood Station. MARTA does not segregate the federal operating assistance received from grants from the Urban Mass Transportation Administration from the other operating funds used to provide these services.

17.

This arbitration proceeding did not involve a dispute arising out of the § 13(c) Agreement, itself. Rather, this arbitration was for the purpose of creating a new and different agreement to govern future terms and conditions of employment.

18.

Section XXXVI of the 1978-81 collective bargaining agreement between plaintiff MARTA and defendant Union provides as follows:

SECTION XXXVI
PERIOD COVERED BY CONTRACT

148. This agreement shall continue in force from June 28, 1978, through June 27, 1981, and from year to year thereafter until either party notifies the other party not less than sixty (60) days prior to the ex-

piration of this agreement, or each extension thereof, of the desire to terminate this agreement or to negotiate changes, modifications or additions thereto.
149. If the notice is to negotiate changes, modifications, or additions, this agreement shall remain in effect until the final completion of the negotiations.

19.

Pursuant to the requirements of the Labor Agreement, MARTA gave the Union notice on April 23, 1981, of its desire to negotiate the terms and conditions of a new labor agreement.

20.

When those negotiations did not result in a new labor agreement, the Union gave MARTA notice on June 25, 1981, of its demand for the arbitration of the terms and conditions of a new labor agreement.

21.

These arbitration proceedings were held pursuant to Paragraph 20 of the 1977 § 13(c) Agreement.

22.

In hearings before the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation, House of Representatives, Ninety-seventh Congress, First Session (June 23, 24, 25; October 21, 1981), Dan Patillo, Chairman of the Board of Directors, MARTA, testified as shown in Stipulated Exhibit 55.

23.

Pursuant to the § 13(c) Agreement, the parties requested the American Arbitration Association for a panel of names from which the neutral member of the Board of Arbitration would be selected.

24.

On October 12, 1981, the interest arbitration began before a Board of Arbitration consisting of J. C. Reynolds (Local 732), William Barnes (MARTA) and John Caraway (Chairman). Fifteen days of hearings were held in Atlanta, Fulton County, Georgia and post-hearing briefs were submitted on December 23, 1981.

25.

On January 28 and 29, 1982, there were meetings attended by Caraway, Burns, Reynolds and Barnes, and on February 19, 1982, there was a telephone conference call involving Burns, Caraway and Barnes.

26.

Following the January 28 and 29 meetings, the parties submitted written material to Arbitrator Caraway regarding the decisions they continued to dispute. Union Arbitrator Burns informed Arbitrator Caraway that he would sign an award if it did not reduce the cost of living adjustments, as MARTA requested, and included a dental health plan.

27.

Chairman Caraway mailed a draft of the Award on February 15, 1982 to the arbitrators for MARTA and Local 732.

28.

On February 19, 1982, a conference call Executive Session was held to discuss the revised draft Award issued by the Chairman.

29.

The MARTA Board had delegated to its General Manager, Alan Kiepper, the authority to institute and defend suits. On February 22, 1982, Kiepper determined that MARTA would revoke its consent to the arbitration and would institute this litigation.

30.

At a work session of some members of the MARTA Board on February 22, 1982, prior to Kiepper's decisions, the Board members present discussed these labor and litigation matters with Kiepper and MARTA attorneys. No formal vote or action of the MARTA Board was taken in this work session, which preceded a regularly scheduled open meeting of the MARTA Board.

31.

On Monday, February 22, 1982, MARTA sent, and Local 732 President J. C. Reynolds received a letter in which MARTA purported to revoke its consent to arbitration.

32.

MARTA hand-delivered, to the office of Union President J. C. Reynolds at 3:45 p.m., E.S.T., on February 22, 1982, a letter from MARTA General Manager Alan F. Kiepper, hereinafter designated "the 2/22 letter." The 2/22 letter is stipulated Exhibit 18.

33.

After receipt of the 2/22 letter at approximately 5:15 p.m., E.S.T., on February 22, 1982, Union President J. C. Reynolds spoke by telephone that same day with defendant Burns and read the contents of the 2/22 letter to defendant Burns.

34.

MARTA also provided defendants Burns and Caraway with copies of the 2/22 letter by depositing them with Federal Express mail carrier on February 22, 1982, for delivery on February 23, 1982, to defendants Burns and Caraway. A copy of the 2/22 letter was received at the offices of defendant Burns at 11:50 a.m., C.S.T., on February 23, 1982.

35.

At the time MARTA revoked its consent to the arbitration, the second proposed award drafted by defendant Caraway, the neutral arbitrator, had not been received by either of the parties or their arbitrators, and the contents of the second proposed award had not been disclosed to either of the parties or their arbitrators.

36.

On February 23, 1982, the offices of the arbitration for Local 732 received the proposed Award. The arbitrator, Martin Burns, at the time the Award was received, was out of town. Martin Burns' associate, Joseph Burns, telephoned him at approximately 12:30 p.m., and informed him that the Award had been received and went over the contents of the Award, reading him selected portions of the Award.

37.

Defendant Burns did not come to his office on February 23, 1982. Joseph Burns wrote "Martin J. Burns W/P JMB" on the proposed Award some time between 12:30 and 2:00 p.m., C.S.T., on February 23, 1982, pursuant to a telephone call from Alexander Cohn in Atlanta. Cohn is an attorney for the International Amalgamated Transit Union. He was

attending proceedings of the Georgia General Assembly. He and Joseph Burns decided that Joseph Burns should affix the name of Martin Burns to the proposed Award before any new legislation was enacted. Later, defendant Burns approved the action of Joseph Burns.

38.

On February 23, 1982, MARTA filed this action for injunctive relief to preserve the status quo regarding the arbitration proceedings and requested that this Court determine the propriety and validity of MARTA's revocation. The Union was served with the Complaint and Summons on February 24, 1982. The other defendants were served by March 5, 1982.

39.

A Temporary Restraining Order was entered on February 23, 1982, after a hearing before Judge Alverson, restraining defendants and other persons acting in concert with them from conducting or participating in any arbitration proceedings relating to the terms and conditions of a new collective bargaining agreement between MARTA and the Union, from the issuance or publications of any award pursuant to such arbitration proceedings, and from taking any action to enforce any such award. This Order was served upon defendants along with the Complaint, and, when received, all defendants had actual notice of the entry of this Order.

40.

The Union filed a Petition for Removal in the United States District Court and MARTA filed a Motion to Remand. On March 24, 1982, the District Court judge signed and entered an Order remanding its jurisdiction over this case.

41.

A hearing was held in this Court on March 25, 1982, at which time the parties were required to show cause why the Temporary Restraining Order should not be extended or converted to a preliminary injunction. A second Temporary Restraining Order was entered enjoining the defendants and other persons acting in concert with them from participating in any additional arbitration proceedings, from the issuance or publication as a final award of defendant Caraway's proposed award, and from taking any action not a part of this litigation to enforce any such award.

42.

At all times since the filing of this suit on February 23, 1982, orders of this Court have been on file enjoining defendants from participating in additional arbitration proceedings or issuing or publishing a final award. Nonetheless, several weeks after the first Temporary Restraining Order was entered, defendant Burns signed a copy of the second proposed arbitration award and sent it to the president of the defendant Union.

43.

Before a final arbitration award, agreed to and signed by a majority of the arbitrators, was issued and published, MARTA revoked its consent to the arbitration.

44.

No final award, agreed to and signed by a majority of the arbitrators, has been issued and published by the arbitrators at this time.

CONCLUSIONS OF LAW

1.

State law is controlling here. Despite the Union's arguments that an arbitration occurring under § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609 (c), should be governed by Federal law, the question has been conclusively resolved otherwise in *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, No. 81-411 (Sup. Court, June 7, 1982). That case found as follows:

> (W)e cannot read § 13(c) to create federal causes of action for breaches of § 13(c) agreements and collective bargaining contracts between UMTA aid recipients and transit unions. The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.

2.

Revocation of an agreement to arbitrate is permissible here.

Arbitration clauses which state that all disputes arising under a contract shall be arbitrated are void as against public policy because they oust the courts of jurisdiction. *State Hwy. Dept.* v. *MacDougald Construction Co.*, 189 Ga. 490. In the case of such "all disputes" clauses, revocation is effective at any time before award. *Parsons* v. *Ambos*, 121 Ga. 98. *Wright* v. *Cecil A. Mason Construction Co.*, 115 Ga. App. 729. But clauses which apply only to specific disputes such as price and quantity — essentially matters in which courts have no jurisdiction anyway — are not invalid per se. *Wright*, supra. *West Point Pepperell* v. *Multi-Line Industries*, 231 Ga. 329 (dictum). And where a clause pertains only to specific questions, the arbitration of which

is to be a condition precedent to the right to sue on the contract itself, then no right of action on the contract arises until after arbitration unless sufficient reason is given for not arbitrating. *Wright,* supra. *Southern Mut. Inc. Co.* v. *Turnley,* 100 Ga. 296. The parties must explicitly state, however, that arbitration is to be a condition precedent to the right to sue. Otherwise, the parties may resort to the courts. *Sasser & Co.* v. *Griffen,* 133 Ga. App. 83. *Adams* v. *Haigler,* 123 Ga. 659.

Since the subject of this arbitration clause — the terms of a new contract — is a dispute over which the court has no jurisdiction, the clause is not void on its face. Instead, the clause falls into the second catagory mentioned above in which revocation is possible only if arbitration was not explicitly made a condition precedent to a right of action on the contract. There is no evidence that such an express condition precedent exists. It therefore appears that MARTA's revocation was valid under the Georgia law on revocation of agreement to arbitrate.

3.

MARTA is not estopped from revoking. The Union argues that MARTA, by its statements and conduct, including its testimony to the District Court and to Congress, waived its right to revoke and is now estopped from so doing. The argument rests on the definition of "binding arbitration" as arbitration from which participation cannot be withdrawn. The § 13(c) agreement of 1977 mentions "binding" only in the context that an award will be binding. A final award, once entered, would certainly have been binding, but it does not follow that the parties were likewise bound to participate in arbitration before the entrance of an award. Thus, in agreeing that a final award would be binding, MARTA did not waive its right to revoke.

4.

MARTA's revocation was not untimely. The Union argues that MARTA's knowledge of the essence of what the award would be makes its revocation untimely. The Union cites by analogy the case of *James* v. *Burton,* 238 Ga. 394, in which a party to a civil case was not permitted to file a voluntary dismissal after the trial judge had rendered an opinion but before the opinion had been formally entered. The analogy would be persuasive but for two facts: 1) the judgment in *James* was a certainty, while here the award was only a probability; 2) the 1964 case of *Register* v. *Herrin,* 110 Ga. App. 736, is directly on point and is in line with a large body of case law permitting revocation at any time before award. Thus, MARTA's revocation was not ineffective merely because it was made at the eleventh hour or because it was made with knowledge of the probable terms of the award.

5.

Ga. Code Ann. § 40-3301 was not violated by the MARTA work session of February 22, 1982. Ga. Code Ann. § 40-3302(f)(1) permits closed discussions of employment matters.

6.

Restraining Orders of this Court were in effect preventing further arbitration proceedings when defendant Burns signed his own name to the second draft of award. Thus, the attempted execution of the second award by defendant Burns is null, void and of no force and effect, and is as if it had not occurred. *Murphy* v. *Harker,* 115 Ga. 77, 87.

7.

Interest arbitration is a proper subject of arbitration under the § 13(c) Agreement. Paragraph (20) of the 1977 § 13(c) Agreement is valid and binding on MARTA and the Union. Legal construction of said paragraph does not lead to the conclusion that either party has lost or waived the right under Georgia law to withdraw from arbitration proceedings before a final award issues.

FINAL ORDER

The Court having determined that on February 22, 1982 MARTA legally revoked its initial consent to arbitrate a new collective bargaining agreement with the Union, those arbitration proceedings terminated on said date and no purported final award from those proceedings shall be issued or published by any party.

That proceeding being dead, all parties to this action are hereby permanently enjoined from continuing with that arbitration and from taking any action inconsistent with the terms of this Order. The subject matter of that proceeding, i.e., a new agreement, shall not be resolved by arbitration.

Nothing in this Order shall be construed to limit or restrict the rights of MARTA and the Union to negotiate in good faith in an effort to arrive at a reasonable collective bargaining agreement which will adequately protect the rights of all Union employees by way of traditional collective bargaining negotiations. Nor shall this Order be construed as limiting or restricting the arbitration of all other "labor disputes" contemplated by the 1977 § 13(c)

Agreement or of future labor agreements other than the contract which expired June 27, 1981.

So ORDERED this 30th day of July, 1982.

RALPH H. HICKS, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit

GEORGIA, FULTON COUNTY, C-83621

I, do certify that the within and foregoing is a true, complete and correct copy of the orignal in said case, as appears by the original on file and of record in the Office of Clerk of Fulton Superior Court. Consisting of 16 pages.

Witness my hand and the seal of said Court this the 15th day of February, 1983.

ESTELLE W. ROBERTS
Deputy Clerk,
Fulton Superior Court

COURT OF APPEALS OF THE STATE OF GEORGIA
Atlanta, February 7, 1983

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

65530. Local Division 732, et al. v. M.A.R.T.A.

This case came before this court upon an appeal from the Superior Court of Fulton County, and upon a record formally certified and transmitted by the clerk of that court; and this court being of the opinion that the case is one of which the Supreme Court and not this court has jurisdiction, the clerk of this court is ordered to dismiss the case from the files and to transmit the records to the Clerk of the Supreme Court together with a copy of this order.

COURT OF APPEALS OF THE STATE OF GEORGIA
Clerk's Office, Atlanta, February 7, 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

ALTON HAWK,
Clerk.

39674. LOCAL DIVISION 732, AMALGAMATED TRANSIT UNION et al. v. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

251 Ga. 15

MARSHALL, Presiding Justice.

This is a dispute between the Metropolitan Atlanta Rapid Transit Authority (MARTA) and Local Division 732, Amalgamated Transit Union (the Union). The question for decision concerns MARTA's revocation of its consent to arbitrate a collective-bargaining agreement with the Union. The superior court ruled that, under Georgia law, MARTA had a right to revoke its consent to arbitrate prior to the arbitration award and that MARTA did so revoke its consent here. For reasons which follow, we affirm.

"The Urban Mass Transportation Act of 1964 (UMTA) enables state and local agencies to obtain federal assistance to finance mass transportation services in urban areas. 49 U.S.C. § 1602 (1976). Section 13(c) of the Act, 49 U.S.C. § 1609(c) (1976), establishes as a 'condition of any assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance.' The section further requires that the labor protective arrangements include such provisions as may be necessary to certain enumerated objectives. Finally, § 13(c) directs that the 'terms and conditions of the protective arrangements' shall be specified in the grant contract between the local authority and the federal government. In practice, the protective arrangements made pursuant to § 13(c) are written agreements (13(c) agreements) negotiated be-

tween the applicant for federal assistance and the bargaining representative of its employees and then approved by the Secretary of Labor.

"MARTA, a public body corporate providing transit service in Atlanta, Georgia, has received UMTA grants for the acquisition, improvement, and operation of its bus and rail transit system. As a grant applicant, MARTA has entered into 13(c) agreements with the Union, which is the collective bargaining representative for a unit of MARTA's employees. The most recent such agreement was executed on February 14, 1977, and, like its predecessors, was determined by the Secretary of Labor to be a fair and equitable protective arrangement." (Footnote omitted.) Local Div. 732, Amalgamated Transit Union v. MARTA, 667 F2d 1327, 1329 (11th Cir. 1982).

The 1977 collective-bargaining agreement between MARTA and the Union (referred to as the § 13(c) agreement) became effective on June 28, 1978, through June 27, 1981. This agreement was to continue from year to year after June 27, 1981, unless either party notified the other party not less than sixty (60) days prior to expiration of the agreement, or each extension thereof, of the decision to terminate the agreement, or to negotiate changes, modifications, or additions thereto. MARTA notified the Union on April 23, 1981, that it desired to negotiate a new collective-bargaining agreement. Negotiations between MARTA and the Union failed to produce a new agreement, and on June 25, 1981, the Union demanded arbitration of the terms and conditions of the new labor agreement pursuant to Paragraph 20 of the 1977 § 13(c) agreement.

Paragraph 20 provides, in pertinent part: "In case of any labor dispute or controversy regarding the application, interpretation, or enforcement of any of the provisions

of this Agreement which cannot be settled by collective bargaining within sixty (60) days after the dispute or controversy first arises, such dispute or controversy may be submitted at the written request of either party hereto to a board of arbitration as hereinafter provided. Upon such written request for arbitration, each party shall, within ten (10) days after such request, select one member of the arbitration board, and the members thus chosen shall select a neutral member who shall serve as chairman . . . the decision by majority vote of the arbitration board shall be final, binding and conclusive . . .'"[1]

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1. It was § 20(b) of the MARTA Act of 1965 (Ga. L. 1965, pp. 2243, 2273), which authorized the Board of Directors of MARTA to bargain with MARTA employees "through such agents in the same manner and to the same extent as if they were the employees of any privately-owned transportation system." This created an exception for MARTA, because under Georgia law local governmental entities generally are not permitted to bargain collectively with employee representatives. See *Intl. Longshoremen's Assn.* v. *Ga. Ports Auth.*, 217 Ga. 712 (1b) (124 SE2d 733) (1962).

However, the 1982 Session of the Georgia General Assembly passed an Act which, among other things, amended the 1965 MARTA Act by striking § 20(b) and replacing it with § 20(b)(1) through (b)(8). Ga. L. 1982, pp. 5101, 5104, § 3. Section 20(b)(2) of the 1982 Act distinguishes between "interest arbitration" ("arbitration which determines or formulates the terms and conditions of a labor agreement between the Authority and the authorized representative, including the formulation of contract provisions governing wages, hours, and working conditions.") and "grievance arbitration" ("arbitration of a dispute between the Authority and the authorized representative acting on

(Footnote continued on next page)

Paragraph 20 goes on to state that "the term 'labor dispute' for the purposes of this paragraph, shall be broadly construed and shall include but not be limited to, any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance, or pension or retirement provisions, any differences or questions that may arise between the par-

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(Footnote continued from preceding page)

behalf of an employee which involves the application or interpretation of the terms and conditions of an existing labor agreement."). Subsection (b)(2) requires MARTA to submit labor disputes to binding grievance arbitration; and labor disputes which involve the formulation of contract provisions other than wages, and which cannot be settled by collective bargaining or fact-finding under subsection (b)(5), shall be submitted to binding interest arbitration, Subsection (b)(2) further provides that "[a]ny labor dispute involving the formulation of contract provisions governing wages may, with the consent of both parties, be submitted to binding interest arbitration." Subsections (b)(2)(A) through (G) specify certain inherent rights of MARTA management which cannot be diluted, diminished, or impaired by an arbitration award or labor agreement. Subsection (b)(3) requires any neutral arbitrator appointed or selected to decide any interest arbitration to be a resident of either Fulton or DeKalb County. Subsections (b)(4)(A) through (F) require the arbitrator in interest arbitration proceedings to give weight primarily to certain factors, e.g., financial ability of MARTA to pay wages, the amount of any fare increase which would be necessary to afford a wage or salary increase, a comparison of wages, hours, working conditions, etc., between MARTA employees and other workers in the public and private sectors of the metropolitan area who perform similar work. The 1982 Act became effective upon being signed by the Governor, which occurred on April 20, 1982.

ties, including the making or maintaining of collective-bargaining agreements, the terms to be included in such agreements, or any grievances that may arise, and any controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Provision (1977 § 13(c) Agreement)."

Pursuant to Paragraph 20, three arbitrators were appointed. Arbitration hearings were held in October and November of 1981. The neutral arbitrator proposed an award, but neither of the other arbitrators was agreeable to it. On January 29, 1982, the Eleventh Circuit Court of Appeals issued an opinion in Local Div. 732, Amalgamated Transit Union v. MARTA, 667 F2d 1327, supra, holding that the federal courts do not have jurisdiction over a suit alleging breach of a § 13(c) agreement between a local transit authority which is an UMTA grant recipient and a union representing its employees.

On February 22, some of the MARTA board of directors had a meeting with various of MARTA's attorneys to discuss the impact of Local Division 732, supra, on MARTA's and the Union's pending arbitration proceedings. Fairly viewed, the record shows that a vote was taken at this meeting for MARTA to withdraw from arbitration with the Union. The public was not given notice of this meeting, although later that day there was a regularly scheduled meeting of the MARTA board, of which the public was given notice.

On February 22, MARTA's General Manager, Alan Kieper, notified the Union president in writing that MARTA was revoking its consent to arbitration. However, on February 23, MARTA and the Union received another proposed arbitration award from the neutral arbitrator, and the Union has sought to approve this award.

On February 23, MARTA filed this complaint against the Union, the arbitrator appointed by the Union, and the neutral arbitrator. In this complaint, MARTA requests declaratory judgment that MARTA is not obligated to engage in arbitration with the Union concerning the terms of a collective-bargaining agreement to replace the agreement between MARTA and the Union which expired on June 27, 1981. MARTA argues that it has withdrawn its consent to arbitrate, and MARTA also requests that the Union and non-MARTA arbitrators be enjoined from continuing with arbitration proceedings.

After entering various temporary restraining orders, the superior court entered a final judgment, concluding that under Local Div. 732, Amalgamated Transit Union v. MARTA, supra, Georgia law is controlling here. The superior court further concluded that under Georgia law, MARTA could and did revoke its consent to arbitration. Accordingly, final judgment was entered in MARTA's favor. The Union appeals.

1. The first question for consideration is whether the superior court was correct in ruling that state law applies in determining the revocability of MARTA's and the Union's arbitration agreement.

Local Div. 732, supra, and the subsequent decision of the United States Supreme Court in Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (102 SC 2202, 72 LE2d 639) (1982) clearly hold that §13(c) agreements between a local transit authority which is an UMTA grant recipient and a Union representing its employees are governed by state law to be applied in state courts. Cf., Republic Steel Corp. v. Maddox, 379 U.S. 650 (85 SC 614, 13 LE2d 580) (1965) and cits.

In the course of rendering the decision in Jackson Transit Auth., supra, the Court noted that labor relations between local governments and their employees are the subject of a long-standing exemption under the National Labor Relations Act, so that relations between local governmental entities and unions representing their employees are governed by state law. 102 SC at p. 2207. Citing from the Senate Hearings on UMTA, the Court noted that assurances had been made that if local law prohibited governmental employees from striking, this ban would not be superseded by UMTA. By a parity of reasoning, Jackson dictates that the enforceability and/or revocability of arbitration agreements between local transit authorities and their unions are governed by state law, notwithstanding the fact that the transit authority is an UMTA grant recipient.

2. In Georgia, there are two types of arbitration, common law and statutory. See 2 EGL 168, Arbitration and Award, § 4 et seq. (1976 Rev.) The arbitration proceedings which took place in the present case are of the common-law variety.

The Union argues that the touchstone for determining whether an agreement to arbitrate is revocable is whether the issue being arbitrated is justiciable. Thus, the Union argues that the arbitration proceedings between it and MARTA were not revocable, since the issue being arbitrated, i.e., the terms and conditions of a new collective-bargaining agreement, was not justiciable. We agree that the issue being arbitrated between MARTA and the Union was not justiciable, but we disagree that the arbitration agreement was not revocable.

As to common-law arbitration, the rule which obtains in Georgia can be stated as follows: When a contract contains

a stipulation that the decision of arbitrators upon certain questions shall be a condition precedent to the right of action upon the contract, such stipulation generally will be enforced; however, when a contract contains a general agreement to arbitrate all questions, or to submit all matters in dispute to arbitration, the agreement to arbitrate may be revoked by either party at any time before the award. *Wright* v. *Cecil A. Mason Const. Co.,* 115 Ga. App. 729 (1) (155 SE2d 725) (1967).

The following statements from *Parsons* v. *Ambos,* 121 Ga. 98, 101 (48 SE 696) (1904) demonstrate that, regardless of the rationale for the rule, general agreements to arbitrate are revocable before the award: " Courts favor the submission of controversies to speedy and inexpensive tribunals of the parties' own selection, and generally, in the absence of fraud or palpable mistake, will not interfere with their findings, even though a verdict of a jury to the same effect might be set aside as contrary to law. But the underlying reason for the recognition of the award is found in the fact that the parties not only agreed to submit their differences, but voluntarily permitted the agreement to be executed, and consented for the award to be actually made by judges of their own selection. The mere executory agreement to submit is generally revocable. Otherwise nothing would be easier than for the more astute party to oust the courts of jurisdiction. By first making the contract and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy . . . A common-law agreement, therefore, to submit the validity and effect of contract, or to submit all matters in dispute, to ar-

bitration, may be revoked by either party at any time before the award . . . Some of the early cases put this rule upon the ground that a provision whereby the courts may be ousted of their jurisdiction is repugnant to that other provision, implied in every contract, that its validity and effect shall be determined by the courts and the law of the land. But whether predicated on the idea that the agreement is repugnant to the contract, or to public policy, the principle is universally recognized that such general submissions are revocable."

Although the principle, that general submissions are revocable at any time before the award, may no longer be universally recognized, it is still recognized in Georgia. The agreement between MARTA and the Union was to submit any labor dispute to arbitration. This was, therefore, a general submission, and the superior court was authorized in finding from the record that it was revoked by MARTA before the award.[2]

3. However, the Union argues that MARTA, by its conduct, either waived its right or is estopped to assert its right to revoke its consent to arbitrate.

This is really a two-pronged argument.

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2. Whether MARTA's assertion of its right to withdraw from arbitration under state law constitutes a violation of the fair-and-equitable-arrangement requirements of UMTA is an issue currently being litigated between the Union and the United States Secretary of Labor in the U.S. District Court for the District of Columbia. Amalgamated Transit Union, AFL-CIO v. Donovan (Civ. No. 82-2042). The Union has brought suit against the Secretary of Labor, arguing that MARTA has forfeited its eligibility for federal funding.

(a) First, the Union argues that, under various fed-laws,[3] MARTA is required to submit to binding arbitration and, therefore, cannot withdraw its consent to arbitrate. However, as we have previously stated, Local Div. 732, supra, and Jackson Transit Auth., supra, hold that state law is applicable here. And, as held by the superior court here, Paragraph 20 of MARTA's § 13(c) agreement with the Union requires MARTA to be bound by any arbitration award, but, under state law, MARTA can withdraw its consent to arbitrate the matter in dispute before the award.

(b) Second, the Union is arguing that MARTA officials made various statements in collective-bargaining agreement negotiations with the Union, in litigation between MARTA and the Union, and in testimony before a congressional subcommittee, to the effect that the § 13(c) agreement required MARTA to submit disputes with the Union to binding arbitration. Therefore, the Union argues that, under doctrines of either waiver or estoppel, MARTA is now barred from revoking its consent to arbitrate.

These statements of MARTA officials were, qnite obviously, based on MARTA's interpretation of its obligations to arbitrate with the Union under federal law. Local Div. 732, Amalgamated Transit Union 1. MARTA, supra, and Jackson Transit Auth., supra, have now held that these obligations must be adjudged under state law. The Union argues, in effect, that these decisions cannot be applied here, because MARTA had previously operated under

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3. Specifically, the Union argues that the Federal Arbitration Act, 9 USC § 1 et seq., is applicable here. See *West Point-Pepperell* v. *Multi-Line Indus.*, 231 Ga. 329 (201 SE2d 452) (1973).

the assumption that federal law and not state law is controlling. We find this argument to be unpersuasive.

4. Finally, the Union argues that MARTA's decision to revoke its consent to arbitration was made at the February 22 meeting of the MARTA board, which was not open to the public. Therefore, the Union argues that MARTA's revocation of its consent to arbitrate violated Georgia's so-called Sunshine Law. Ga. L. 1972, p. 575 et seq.; as amended, Ga. L. 1982, p. 1810 et seq. (Code Ch 40-33; OCGA Ch. 50-14).

As previously stated, the February 22 meeting alluded to by the Union was a meeting between some members of the MARTA board and MARTA's attorneys, and the purpose of the meeting was to discuss the impact of the 11th Circuit decision in Local Div. 732, supra, on the arbitration proceedings then pending between MARTA and the Union. We agree with MARTA that, under the Sunshine Law, the public may be excluded from such meetings between members of a public agency and its attorneys in order to protect the attorney-client privilege. OCGA § 50-14-2 (Code Ann. § 40-3303).

In addition, at the time of the February 22 meeting, the Sunshine Law applied only to "meetings . . . at which official action [were] to be taken . . ." Code Ann. § 40-3301 (a) (Ga. L. 1972, p. 575).[4] We agree that any vote taken at the February 22 meeting for MARTA to withdraw from arbitration with the Union did not constitute "official action," since MARTA's General Manager, under MARTA

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4. Effective November 1, 1982, the Sunshine Law was amended to apply to "[a]ll meetings of any agency at which official action is to be discussed or at which official action is to be taken . . ." OSGA § 50-14-1(c) (Ga. L. 1982, p. 1810) (Code Ann. § 40-3301).

by-laws,[5] possessed the authority to revoke MARTA's consent to arbitration without board approval.

Judgment affirmed. All the Justices concur, except Gregory, J., who dissents.

DECIDED MAY 11, 1983.

Arbitration of collective bargaining. Fulton Superior Court. Before Judge Hicks.

Adair & Goldthwaite, Donald R. Livingston, Jacobs, Burns, Sugarman & Orlove, Linda R. Hirshman, for appellants.

Kutak, Rock & Huie, W. Stell Huie, Lawrence L. Thompson, C. Wilson Dubose, Terrence Lee Croft, for appellee.

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5. The MARTA by-laws, adopted pursuant to § 6(j) of the MARTA Act, delegate to the general manager "all the power and authority delegable to him in accordance with law, including but not limited to," the following: (1) general and active supervision of the business and affairs of MARTA, and the administration of MARTA, including general supervision of the policies of MARTA and general and active supervision of the financial affairs of MARTA; (2) general superintendence and direction of all non-board member officers and employees of MARTA; (3) the power, authority, and duty to institute suits on behalf of MARTA and to defend suits brought against MARTA.

§ 1609. Labor standards

Interest of employees; protective arrangements; terms and conditions

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Pub.L. 88-365, § 13, formerly § 10, July 9, 1964, 78 Stat. 307, renumbered and amended Pub.L. 89-562, § 2(a)(1), (b)(2), Sept. 8, 1966, 80 Stat. 715, 716; Pub.L. 90-19, § 20(a), May 25, 1967, 81 Stat. 25.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
July 30, 1947, c. 392, 61 Stat. 670.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY ACT OF 1965 ("MARTA ACT")
Ga. L. 1965, p. 2243, § 20(b)

"(b) The Board may provide for the recognition of authorized representatives of the employees of the Authority and for bargaining with its employees through such agents in the same manner and to the same extent as if they were the employees of any privately owned transportation system."

No. 83-209

In The

Supreme Court of the United States

October Term, 1983

LOCAL DIVISION 732, AMALGAMATED TRANSIT UNION,

Petitioner,

vs.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Of Counsel:

JOHN R. BARMEYER
Chief Staff Counsel
Metropolitan Atlanta Rapid Transit Authority
2200 Peachtree Summit Bldg.
401 West Peachtree St., N.E.
Atlanta, Georgia 30365

W. STELL HUIE
LAWRENCE L. THOMPSON*
C. WILSON DUBOSE
KUTAK ROCK & HUIE
1200 Anchor Savings Bank Bldg.
Atlanta, Georgia 30303
Telephone: 404/522-8700

*Counsel of Record

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Did the Superior Court of Fulton County, Georgia and the Supreme Court of Georgia properly construe this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982), in applying Georgia law to determine the enforceability of an arbitration provision in a "13(c) agreement" between a local government transit agency and a union representing some of its employees?

2. Did the Superior Court of Fulton County and the Georgia Supreme Court properly decline to apply the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, in determining the enforceability of an arbitration to formulate the terms and conditions of an entirely new collective bargaining agreement for certain employees of a local government transit agency?

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No. 83-209

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vs.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Respondent, Metropolitan Atlanta Rapid Transit Authority, respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia entered in this case on May 11, 1983, be denied.

OPINIONS BELOW

The opinion of the Superior Court of Fulton County, Georgia is unreported and appears at the Appendix to the

Petition ("Pet. App.") at A1; the order of the Georgia Court of Appeals is unreported and appears at Pet. App. B1; the opinion of the Supreme Court of Georgia is reported at 251 Ga. 15, 303 S. E. 2d 1 (1983), and is printed in Pet. App. at C1.

JURISDICTION

This Court's jurisdiction is based on 28 U. S. C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Metropolitan Atlanta Rapid Transit Authority Act of 1965, Ga. Laws 1965, pp. 2243, *et seq.*, as amended. The pertinent portion of this statute is printed at Pet. App. F1.

STATEMENT OF THE CASE

I. Facts

On June 27, 1981, the Metropolitan Atlanta Rapid Transit Authority ("MARTA") and Local Division 732, Amalgamated Transit Union, AFL-CIO ("Union") were parties to two agreements. One, a "labor agreement", or collective bargaining agreement, set forth the terms and conditions of employment for those MARTA employees represented by the Union. The other, a "13(c) agreement", had been approved by the Secretary of Labor as an adequate protective arrangement for Union employees under Section 13(c) of the Urban Mass Transportation Act of 1964 ("UMTA Act"), 49 U. S. C. § 1609(c).

On June 27, 1981, the labor agreement expired and MARTA and the Union, pursuant to an arbitration clause

in the 13(c) agreement, entered into interest arbitration, a process in which two partisan arbitrators and one neutral arbitrator determine the terms and conditions of a new labor agreement between MARTA and the Union, including the wages and other employment conditions of Union employees.

A dispute and subsequent litigation arose over what wages should be paid to Union employees during the arbitration to form a new labor agreement. On January 29, 1982, the U. S. Court of Appeals for the Eleventh Circuit held, for the first time among the several Courts of Appeals which had previously considered the issue,[1] that the interpretation of the 13(c) agreement was to be governed by Georgia, not federal law. *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlantic Rapid Transit Authority*, 667 F. 2d 1327, 1345, *reh'g denied*, 671 F. 2d 1382 (11th Cir. 1982), *stay denied* 50 U.S.L.W. 3801 (April 5, 1982). That decision was subsequently confirmed by this Court in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U. S. 15 (1982).

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[1] *Div. 587, Amal. Transit Union v. Municipality of Metropolitan Seattle*, 663 F. 2d 875 (9th Cir. 1981); *Local Div. 1285, Amal. Transit Union v. Jackson Transit Authority*, 650 F. 2d 1379 (6th Cir. 1981); *Local Div. 714, Amal. Trans. Union v. Greater Portland Transit Dist.*, 589 F. 2d 1 (1st Cir. 1978); *Local Div. 519, Amal. Transit Union v. LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (7th Cir. 1978); *Div. 1287, Amal. Transit Union v. Kansas City Area Transportation Auth.*, 582 F. 2d 444 (8th Cir. 1978), *cert. denied*, 439 U. S. 1090 (1979).

Because the interest arbitration was still in progress at the time of the Eleventh Circuit decision, MARTA management consulted its counsel and exercised its right under Georgia law to revoke its consent to and withdraw from the interest arbitration proceeding.

II. Proceedings Below

MARTA filed this action in the Superior Court of Fulton County, Georgia, seeking a declaration that MARTA had properly exercised its right under Georgia law to withdraw from the arbitration. The Superior Court restrained further arbitration proceedings until a decision on the merits. The Union attempted to remove the case to federal court, but following the Eleventh Circuit's issuance of the mandate in *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, supra,* the District Court granted MARTA's motion to remand this case back to state court (R. 192). The Union appealed the remand order, but dismissed its appeal following this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, supra.*

While this case was pending in the trial court, the Georgia General Assembly enacted a statute which for the first time provided for interest arbitration of MARTA-Union contracts. The statute also established procedures concerning the selection of arbitrators and the standards for decision in future interest arbitrations that might occur between MARTA and the Union. Ga. Laws 1982, pp. 5101, *et seq.*[1]

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[1]The neutral arbitrator in the arbitration at issue here, a non-resident of Georgia, would be ineligible to serve as an interest arbitrator in a future arbitration. Ga. Laws 1982, p. 5104.

After a hearing on the merits, the trial court concluded that under *Jackson, supra,* Georgia law governed the construction of the arbitration clause of the 13(c) agreement, and that Georgia law permitted any party to withdraw from a common law arbitration at any time prior to award (Pet. App. A-16, 17). The trial court also found that the arbitration proceeding did not involve a dispute arising out of the 13(c) agreement, but "was for the purpose of creating a new and different agreement to govern future terms and conditions of employment." (Pet. A-9). Hence, the trial court properly rejected the Union's claim (R. 308) that the Federal Arbitration Act applied to the arbitration.

The Georgia Court of Appeals transferred the Union's appeal to the Georgia Supreme Court for jurisdictional reasons (Pet. App. B) and on May 11, 1983, the Georgia Supreme Court, applying Georgia law, affirmed the decision of the trial court. 251 Ga. 15, 303 S. E. 2d 1 (1983) (Pet. App. C).

REASONS FOR DENYING THE WRIT

I.

The Trial Court and the Georgia Supreme Court properly applied this Court's decision in Jackson.

In *Jackson, supra,* this Court decided not only that unions may not bring actions under 13(c) agreements in the federal courts, but also that the construction and enforcement of 13(c) agreements are to be governed by state law. As Justice Blackmun's opinion concluded:

> Given this explicit legislative history, we cannot read 13(c) to create federal causes of action for breaches of 13(c) agreements and collective bargaining agreements between UMTA aid recipients and transit unions. The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.
>
> *Jackson, supra,* 457 U. S. at 29.

The Superior Court of Fulton County and the Supreme Court of Georgia were correct in applying Georgia law to determine the enforceability and effect of the arbitration clause in the 13(c) agreement between MARTA and the Union.

Further, contrary to the Union's statements in its petition (at 8-11), this case has nothing to do with the enforcement of promises made to the federal government in connection with federal financial assistance. This Court in *Jackson* explicitly distinguished between a transit agency-union 13(c) agreement and any promises that a transit agency might make to the federal government in connection with the grant of federal funds:

> There are other possible remedies for violations of § 13(c) agreements and collective bargaining contracts. The union, of course, can pursue a contract action in state court. In addition, the Federal Government can respond by threatening to withhold additional financial assistance. [citations omitted]
>
> While we hold that the union cannot sue in federal court to enforce its contracts, we express no view on the entirely separate question whether the Federal Government could bring a federal suit against a UMTA funding recipient for violating the terms of its grant agreement with the Government. Such a suit would involve a different contract from the § 13(c)

agreement and the collective bargaining agreement at issue in this case. [cites omitted]

Jackson, supra, 457 U. S. at 29, fn. 13.

The Union has instituted a separate action against the Secretary of Labor, claiming that MARTA should be declared ineligible for future federal transit assistance because § 13(c) has been violated, and that the Secretary of Labor's determination that MARTA is still eligible for federal assistance should be set aside.[3] In both that suit and here, the Union claims it has a "federal right" under § 13(c) to compulsory interest arbitration. In the only post-*Jackson* federal opinion construing § 13(c), however, the federal district court for the District of Columbia has found that § 13(c) does not require compulsory interest arbitration as a condition for federal transit funding. *Amalgamated Transit Union v. Donovan,* 554 F. Supp. 589 (D. D. C. 1982).[4] The Georgia courts quite properly ap-

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[3] *Amalgamated Transit Union, et al. v. Raymond J. Donovan,* Civil Action No. 82-2042, U. S. Dist. Ct., D. C., pending decision on cross-motions for summary judgment. This suit claims that the 1982 Georgia legislation, see p. 4 supra, makes it impossible for MARTA to comply with § 13(c). The suit challenges the Secretary of Labor's continued certification that MARTA is complying with § 13(c).

[4] The district court denied the Union's request for a preliminary injunction to cut off federal funds for three transit agencies after the Secretary of Labor had issued conditional § 13(c) certifications without requiring compulsory interest arbitration, stating as follows:

> During Congressional hearings, union officials urged adoption of language which would '[insure] the existence of authority for any employer and the bargaining representative of the employees to enter into enforceable arbitration agreements' and would require these protective arrangements, which included the above provision, 'not be limited

(Continued on next page)

plied Georgia law to the construction and enforcement of the MARTA 13(c) agreement and left resolution of claims concerning MARTA's eligibility for federal transit funds to the Secretary of Labor, subject to review by the federal courts.

II.

The Trial Court and the Georgia Supreme Court properly declined to apply the Federal Arbitration Act to this case.

This case does not involve the refusal of the Georgia courts to apply the Federal Arbitration Act in those cases where it should apply. If the Act requires arbitration, the Georgia courts will enforce arbitration. *West Point-Pepperell, Inc. v. Multi-line Industries, Inc.*, 231 Ga. 329, 201 S. E. 2d 452 (1973); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Wilbanks*, 162 Ga. App. 154, 290 S. E. 2d 122 (1982); *Paine, Webber, Jackson & Curtis, Inc. v. McNeal*, 143 Ga. App. 579, 239 S. E. 2d 401 (1977). But both this Court and the Georgia Supreme Court recognize that the Federal Arbitration Act does not require enforcement

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(Continued from previous page)

to employers of existing mass transportation systems, but shall also include employees employed on any new project, system, line, operation or facilities . . .' [citations omitted]. That these two provisions were rejected by Congress and do not now appear in Section 13 of UMTA demonstrates to the Court in the context of this preliminary injunction motion the Congress did not want to require a mandatory or enforceable form of impasse resolution [citations omitted] and did not want to require that the terms of collective bargaining agreements when transit companies first became public would have to continue in perpetuity.

554 F. Supp at 597-98.

of agreements to arbitrate which fall outside the requirements of the Act itself.[5] *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198 (1956); *Rockdale County v. City of Conyers*, 231 Ga. 477, 202 S. E. 2d 436 (1973).

In fact, two of the prerequisites to the application of the Federal Arbitration Act are missing from this case. First, the written agreement to arbitrate must call for arbitration of a dispute arising out of the making, performance or breach of the same contract in which the arbitration agreement is found. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967). As the trial court found, the arbitration at issue was to make a totally new contract, not to resolve a dispute about the contract containing the arbitration clause itself.[6]

The federal cases cited by the Union in which interest arbitration was required do not rest on the Federal Arbitration Act.[7] Instead, they rest on the federal common law of labor relations enunciated by the federal courts under the authority of *Textile Workers Union of America*

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[5]Section 2 of the Federal Arbitration Act provides:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, 392, 61 Stat. 670. 9 U. S. C. § 2.

[6]See p. 5, *supra*.

[7]See fn. 8, p. 8 of Union's Petition.

v. Lincoln Mills of Alabama, 353 U. S. 448 (1957) and pursuant to § 301(a) of the Labor Management Relations Act.[8]

In two companion cases to *Lincoln Mills*, this Court upheld enforcement of labor arbitrations, but its decisions were explicitly based on Section 301 of the Labor Management Relations Act, and not, as one of the Courts of Appeals had held, on § 2 of the Federal Arbitration Act. *General Electric Co. v. Local 205, United Electrical, Radio & Machine Workers of America*, 353 U. S. 547 (1957); *Goodall-Sanford, Inc. v. United Textile Workers of America*, 353 U. S. 550 (1957).

During the pre-*Lincoln Mills* period when the First Circuit had held that labor arbitration was enforceable under the Federal Arbitration Act, rather than under § 301, Judge Charles Wyzanski refused to apply the Federal Arbitration Act to enforce a written agreement to submit to arbitration the formation of a new contract to govern employment conditions following expiration of a collective bargaining agreement. *Boston Printing Pressmen's Union v. Potter Press*, 141 F. Supp. 553 (D. Mass. 1956), *aff'd*, 241 F. 2d 787 (1st Cir. 1957), *cert. denied*, 355 U. S. 817 (1957). Judge Wyzanski refused en-

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[8] Arbitration is the centerpiece of the federal common law of labor relations, *United Steelworkers of America v. American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

forcement because the Federal Arbitration Act requires arbitration only of disputes over the contract containing the arbitration clause, not arbitration of a totally new agreement.[9]

Interest arbitration—the formation of a future labor agreement by arbitration—is enforceable only under the federal private sector labor law of *Lincoln Mills*, the National Labor Relations Act, and the Labor Management Relations Act.[10] But this is the body of private sector labor law which this Court said that the Congress did not intend to apply to local transit agencies when it enacted § 13(c). *Jackson, supra*, 457 U. S. at 23-24.[11] Since *Lincoln Mills* and *Potter Press*, no court has relied on the Federal Arbitration Act to require formation by arbitration of the substance of an entirely new contract.

The second prerequisite to the application of the Federal Arbitration Act which is missing from this case is that the arbitration clause itself must be contained in "a

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[9]As Judge Wyzanski stated, " . . . the present United States Arbitration Statute does not seek to [enforce legislative awards of arbitrators], but is concerned only with the enforcement of quasi-judicial awards directed at the ascertainment of facts in a past controversy and at the prescription of recoverable damages or other suitable awards for that which has been broken not for that which is to be built." 141 F. Supp. at 557-558.

[10]29 U. S. C. § 152(2); 29 U. S. C. § 185(a).

[11]". . . labor relations between local governments and their employers are the subject of a longstanding statutory exemption from the National Labor Relations Act. 29 U. S. C. § 152 (2). Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees."

457 U. S. at 23-24.

contract evidencing a transaction involving commerce. . . ." 9 U.S.C. § 2. But the 13(c) agreement concerns no more than various provisions involving the rights, privileges, benefits and other employment conditions of the local transit employees of a local governmental transit agency (R. 26). The agreement nowhere calls for or evidences any transaction involving commerce. It is nothing more than an agreement specifying certain conditions of local employment, similar to a local employment agreement which this Court held was governed not by the Federal Arbitration Act, but by Vermont law, which permitted the revocation of consent to arbitrate at any time prior to award. *Bernhardt v. Polygraphic Co. of America, supra.*

The Federal Arbitration Act does not apply to this case and the Georgia courts properly declined to apply it.

III.

This case does not implicate major federal questions or policies.

In *Jackson,* this Court held that relations between local transit agencies and transit labor unions, including the construction of agreements between them, are to be governed by state law and state policy applied by state courts. Further review of the Georgia Supreme Court's decision in this case would undermine the effect and in-

tent of this Court's unanimous decision in *Jackson*. Any further federal questions surrounding § 13(c) are being developed, and should be developed, in the Union's ongoing litigation challenging the Secretary of Labor's construction and application of § 13(c).[12]

Construction of the many contracts between transit agencies and transit unions will involve application of myriad doctrines of state law, which differ from state to state.[13] As *Jackson* intended, these local matters should be left to the courts of the fifty states.

This Court held in *Jackson* that § 13(c) does not create federal rights for local transit unions, and hence these differing state doctrines should constitute proper state law grounds for sustaining state court decisions involving § 13(c) agreements. Unless this Court overrules its unanimous decision in *Jackson* and finds that § 13(c) in fact created a right to enforceable interest arbitration,[14]

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[12]See page 7 and footnotes 3 and 4, *supra*.

[13]For example, in the trial court and in the Georgia Supreme Court, both MARTA and the Union devoted considerable attention to contentions that interest arbitration involves a delegation, contrary to sound public policy, of the duty of public officials to participate directly in establishing wages and terms of employment for public employees. Courts in other states have applied a variety of doctrines to uphold and strike down interest arbitration contracts and statutes. *See, e. g., San Francisco Fire Fighters Local 798 v. City and County of San Francisco*, 137 Cal. Rptr. 607, 68 Cal. App. 3d 896 (1st Dist. 1977), *petition for hearing denied* 95 LRRM 3069 (Cal. Sup. Ct. 1977); *City of Spokane v. Spokane Police Guild*, 87 Wash. 2d 457, 553 P. 2d 1316 (1976); *Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn*, 394 Mich. 229, 231 N. W. 2d 226 (1975); *Salt Lake City v. Int'l. Ass'n. of Firefighters, Locals 1645, et al.*, 563 P. 2d 786 (1977); *Greeley Police Union v. City Council of Greeley*, 191 Colo. 419, 553 P. 2d 790 (1976).

[14]A right which has been found not to exist, see p. 7, *supra*.

the Georgia Supreme Court's construction of MARTA's 13(c) agreement should be left undisturbed.

CONCLUSION

This case was properly decided in the court below and is not an appropriate case for the granting of certiorari by this Court. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. Stell Huie
Lawrence L. Thompson*
C. Wilson DuBose

Kutak Rock & Huie
1200 Anchor Savings Bank Building
Atlanta, Georgia 30303
(404) 522-8700

Of Counsel:
John R. Barmeyer
Chief Staff Counsel
Metropolitan Atlanta Rapid
Transit Authority
2200 Peachtree Summit Bldg.
401 West Peachtree St., N.E.
Atlanta, Georgia 30365

*Counsel of Record

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Respondents.

PETITIONERS' REPLY MEMORANDUM

LINDA R. HIRSHMAN
JACOBS, BURNS,
SUGARMAN & ORLOVE
201 North Wells Street,
Ste. 1900
Chicago, Illinois 60606
Telephone: 312/372-1646

OF COUNSEL:

EARLE PUTNAM
General Counsel
Amalgamated Transit Union
5025 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Merrill/Gunthorp/Warren, Chicago • 372-2800

TABLE OF AUTHORITIES

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Respondents.

PETITIONERS' REPLY MEMORANDUM

Petitioners here seek review of the Georgia Supreme Court's refusal to enforce the law Georgia passed and the commitments the Metropolitan Atlanta Rapid Transit Authority ("MARTA") made to satisfy the federal Urban Mass Transportation Act, 49 U.S.C. §1601, *et seq.* ("UMTA"), and qualify for federal funds. Rather than address this issue, MARTA tries two diversions. First, MARTA discusses an unrelated case the International Amalgamated Transit Union[1] happens to be litigating elsewhere. Next, MARTA defends the decision below on grounds the Georgia courts never addressed, inviting this court to leave standing the existing, indefensible decision.

The unrelated case, *Amalgamated Transit Union* v. *Donovan*, No. 82-2042 (D.D.C.), involves the new MARTA law of 1982, Ga. Laws 1982, pp. 5101-14, passed after all

1 The International Amalgamated Transit Union is not a party to the instant case.

events in this case had occurred.[2] In *Amalgamated Transit Union* v. *Donovan*, the International Amalgamated Transit Union is challenging the United States Secretary of Labor's decision that MARTA may qualify for future federal assistance under the UMTA after passage of the 1982 Act. By invoking the litigation in *Amalgamated Transit Union* v. *Donovan*, Respondent would obscure the issue unique to this case: whether the Georgia Court may refuse to enforce commitments made for eleven years before passage of the 1982 Act to receive millions of dollars in federal grants.[3]

MARTA's suggestion that, to reverse the decision below, this Court must "overrule [] its unanimous decision in *Jackson* and find that §13(c) in fact created a right to enforceable interest arbitration" (Resp. Br., p. 13) is, of course, nonsense.[4] Since 1971, the §13(c) Agreements at issue here provided for interest arbitration. In *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), this Court held that the UMTA required state law to

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2 The 1982 Act, which amended the 1965 law at issue in this dispute, forbids MARTA to bargain collectively over a number of subjects and prohibits it from agreeing to a meaningful dispute resolution mechanism. It thus represents a complete turnaround from the 1965 statute at issue in this case, which, as written, authorized MARTA to make the arrangements the UMTA required (*see* Pet. Br., p. 8, n. 8). (Pet. Br., will refer to our Petition for Certiorari. Resp. Br. will refer to MARTA's Brief in Opposition to Petition for a Writ of Certiorari.)

The 1982 Act is not retroactive. No party to this case has ever contended that the 1982 Act applied to any aspect of this case.

3 MARTA's assertion that "[i]n both that suit and here, the Union claims it has a 'federal right' under §13(c) to compulsory interest arbitration" (Resp. Br., p. 7) is simply misleading. In this case, in order to satisfy the UMTA and obtain the federal assistance, the Georgia legislature authorized and MARTA agreed to such arbitration. Whether the UMTA requires the legislature again to allow and MARTA again to agree to such arbitration is a different question.

4 MARTA's use of the phrase "enforceable" with regard to interest arbitration language (Resp. Br., p. 13) is unclear. Surely, MARTA did not think that for eleven years its federal funding depended on, and the Union contracted repeatedly for, *unenforceable* arbitration.

"protect" the employees' "rights" and that §13(c) Agreements were to be "enforceable" (*Jackson, supra*, at 20-21, 27-28). Requiring Georgia to enforce its own law and contracts here will follow *Jackson*, not overrule it. Only allowing the Georgia Court to ignore its own conforming law and render the 13(c) Agreements "unenforceable" would violate *Jackson*.

Finally, as Respondent's Brief well illustrates, in its present posture, this case implicates no local policy, but, rather, turns on the federal question of the meaning of the federal Arbitration Act, 9 U.S.C. §1 *et seq*. As set forth in the Petition here, the federal Arbitration Act generally overrules and replaces the old common law doctrine, which the Georgia Courts applied here, that contracts to arbitrate are unenforceable.

The Georgia Supreme Court rejected the Union's contention that the federal Arbitration Act rendered this contract to arbitrate enforceable, ruling that "as we have previously stated, *Local Div. 732, supra*, and *Jackson Transit Auth., supra*, hold that state law is applicable here." (Pet. App. C10).[5] Perhaps in light of this Court's contrary ruling in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ___ U.S. ___, 103 S.Ct. 927 (1983), MARTA does not defend the Georgia Supreme Court's choice of its local revocation doctrine over the federal Act. Instead, MARTA defends the decision based on two other unrelated contentions, neither of which was ruled on below.[6] Since the Georgia courts simply refused to apply the Act at all, we do not know whether or not they would classify the §13(c) Agreement, sent to Washington to qualify MARTA for federal funds to operate

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5 This is the Georgia Court's sole ruling on the subject of the federal Arbitration Act. Although MARTA proffered its other contentions regarding the scope of the Act, the Georgia Court did not even address them, much less adopt them.

6 MARTA contends that the §13(c) Agreements do not "evidence a transaction involving commerce," as required by the Arbitration Act, and that the Arbitration Act does not apply to agreements to engage in interest arbitration. (Resp. Br., pp. 9, 11).

its piece of the interstate transit system, as related to interstate commerce under the Act.[7] Nor do we know whether the Georgia Courts would interpret the federal Act as not applicable to interest arbitration. Now that, under the impact of *Moses H. Cone*, MARTA has abandoned the existing decision on this point, at the least, this court should grant the writ and vacate the opinion for the Georgia court to decide the issues actually before it.[8]

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7 The Trial Court here found as fact that:

> Since MARTA began its operations, MARTA has bought goods and equipment from sources outside of Georgia. Among the funds used to purchase such goods and equipment were funds provided by grants from the U.S. Urban Mass Transportation Administration.
>
> Since MARTA began its operations, MARTA has operated bus routes to and from Atlanta/Hartsfield International Airport, the Greyhound and Trailways Intercity bus stations, and the Brookwood Station. MARTA does not segregate the federal operating assistance received from grants from the Urban Mass Transportation Administration from the other operating funds used to provide these services.

(Pet. App., p. A9) (paragraph numbers omitted).

8 MARTA's contention that the Georgia Courts would find its §13(c) Agreement to be too remote from commerce to qualify under the Act simply ignores this Court's own definitive decisions recognizing the generous interpretation to be accorded the federal Arbitration Act. *Inter alia*, *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401, n. 7 (1967). MARTA also simply ignores the countless decisions in the last twenty-five years routinely applying the federal Arbitration Act to contracts relating to employment, including collective bargaining agreements. *Inter alia*, *Milwaukee Typographical Union No. 23* v. *Newspapers, Inc.*, 639 F.2d 386 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981) (collective bargaining agreement covered by FAA); *Bell Aerospace Co. Division of Textron, Inc.*, v. *Local 516, UAW*, 500 F.2d 921 (2d Cir. 1974) (collective bargaining agreement covered by FAA); *Electronics Corp. of America* v. *International Union of Electrical, Radio & Machine Workers Local 272*, 492 F.2d 1255 (1st Cir. 1974) (collective bargaining agreement); *Dickstein* v. *duPont*, 443 F.2d 783 (1st Cir. 1971) (contract of employment by brokerage firm); *Newark Stereotypers Union No. 18* v. *Newark Morning Ledger Co.*, 397 F.2d 594 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968) (collective bargaining agreement); *Bache Halsey Stuart Shields, Inc.* v. *Moebius*, 531 F. Supp. 75 (E.D.Wis. 1982) (individual employment agreements).

CONCLUSION

MARTA's Brief in Opposition to the Petition for a Writ of Certiorari presents this Court with the most pressing reason to grant the writ. By abandoning the Georgia Court's decision, MARTA acknowledges that it is wrong; because there are countless §13(c) Agreements to arbitrate in place all over the country, the Georgia Court's misapplication of the federal Arbitration Act cannot be allowed to stand.

For these reasons, and as set forth in the Petition for Certiorari, the Writ should be granted.

Respectfully submitted,

LINDA R. HIRSHMAN
JACOBS, BURNS,
SUGARMAN & ORLOVE
201 N. Wells, Ste. 1900
Chicago, Illinois 60606
Telephone 312/372-1646

OF COUNSEL:

EARLE PUTNAM
General Counsel
Amalgamated Transit Union
5025 Wisconsin Avenue, N.W.
Washington, D.C. 20016

MARTA's last contention — that the FAA does not apply to interest arbitration — is equally ill-founded. MARTA cites only *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 553 (D. Mass. 1956), 241 F.2d 787 (1st Cir.), *cert. denied*, 395 U.S. 817 (1957), which was overruled on other grounds in *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Since then the federal courts have not refused to apply the FAA to interest arbitration agreements; thus, MARTA has no surviving authority for its contention at all. Moreover, in *Chattanooga Mailers Union, Local 92* v. *Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975), the Court, in enforcing a commitment to interest arbitration, routinely referred to the FAA for governing procedures.